Smart Glove Corp Sdn Bhd v Industrial Court, Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R1–25–185 OF 2003
RAUS SHARIF J
14 JULY 2006

Labour Law — Employment — Probationer — No letter to extend the probationary period nor letter of confirmation — Continued working until dismissal — Whether dismissal was without just cause or excuse

The second respondent commenced employment with the applicant as the General Manager (Manufacturing Division) on 1 November 1998 with a basic salary of RM8,000 per month. Clause 6, 7 and 8 of the second respondent's letter of appointment provide for probationary period, termination and confirmation. At the end of the probationary period of three months, there was no letter from the applicant to extend the second respondent probationary period by another three months. There was also no letter of confirmation issued by the applicant. Nevertheless, the second respondent continued working for the applicant, until he was dismissed by the applicant with effect from 18 March 1999. On the first hearing, the Industrial Court allowed the learned counsel for the applicant an adjournment on 13 May 2003 as all the applicant's witnesses were not in court. On 13 May 2003, learned counsel for the applicant again informed the Industrial Court that his witnesses were not in Court even though they had been informed by him of the hearing date. He requested that it be placed on record that he applied for an adjournment on the ground that his witnesses were not in Court. The Industrial Court did not allow the second application for adjournment and ordered the hearing to begin. The Industrial Court then proceeded with the hearing and heard the evidence of the second respondent. The Industrial Court found that the second respondent had been dismissed without just cause or excuse. This is an application by the applicant for an order of certiorari to quash the decision of the Industrial Court. The applicant had also applied for an order of mandamus to direct the Industrial Court to re-hear the second respondent's claim against the applicant and to hand down an appropriate award. The applicant contended that the learned Chairman had made a mistake in refusing the adjournment requested by the applicant and thereby breaching the principle of natural justice.

Held, dismissing the application with costs:

(1) The learned Chairman's decision in not allowing the second adjournment was a proper exercise of her discretion. The applicant, after failing to produce its witnesses and after being given the second chance to do so, has itself to be blamed when the Industrial Court refused to grant further adjournment. Clearly, the applicant did not take hearing dates seriously. In fact learned

counsel for the applicant informed the Industrial Court that the managing director of the applicant could not come on that day because of his busy schedule. He may have a busy schedule, but the court must not be made to wait for him until the day he is free. As pointed by the learned Chairman, the case has been pending for more than two and a half years (see paras 14–15).

(2) The second respondent's dismissal cannot be treated as a termination simpliciter. The question whether there is any difference between a termination and dismissal has been dealt with in *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304 where the Federal Court held that there was no material distinction between the two. Even if no reason was given on the termination of a workman, such termination based on mere contractual notice must still be grounded on just cause or excuse for it to be justified. This must be more true when as in the present case the letter of termination stated that the second respondent had been 'found unfit to the company'. Since the applicant had chosen to give the reason for the termination, it is incumbent for the applicant to adduce evidence to support its claim (see paras 18, 20–21).

(3) The applicant failed to adduce evidence to support its claim. Instead from the evidence of the second respondent it is revealed that the applicant did not carry out any performance appraisal on the second respondent. The applicant did not indicate to the second respondent that his work was unsatisfactory. There was no verbal or written warning being given to the second respondent about the unsatisfactory work performance. In fact no show cause letter was ever issued and there was no domestic inquiry held before the dismissal of the second respondent. The Industrial Court was right in holding that the applicant was dismissed without just cause or excuse (see paras 22–23).

(4) It is a well established principle that a probationer enjoys the same rights as a permanent or confirmed employee and his service cannot be terminated without just cause or excuse. Like a confirmed officer, a probationer is also entitled to compensation when he is found that his service is terminated without just cause or excuse. By s 30 of the Industrial Relations Act 1967, the amount of compensation to be awarded is within the discretion of the Industrial Court (see para 25).

[Bahasa Malaysia summary

Responden kedua mula bekerja dengan pemohon sebagai Pengurus Besar (Bahagian Perkilangan) pada 1 November 1998 dengan gaji bersih sebanyak RM8,000 sebulan. Klausa 6, 7, dan 8 surat lantikan responden kedua memperuntukkan tempoh percubaan, penamatan dan pengesahan. Pada akhir tiga bulan tempoh percubaan, tiada surat daripada pemohon untuk melanjutkan tempoh percubaan responden kedua untuk tiga bulan lagi. Tiada juga surat pengesahan yang dikeluarkan oleh pemohon. Walau bagaimanapun, responden kedua terus bekerja dengan pemohon, sehingga dia dipecat oleh pemohon bermula daripada 18 Mac 1999. Pada perbicaraan pertama, Mahkamah Perusahaan membenarkan peguamcara pemohon satu penangguhan ke 13 Mei 2003 oleh kerana saksi-saksi pemohon tiada di Mahkamah. Pada 13 Mei 2003, peguamcara pemohon sekali lagi memberitahu Mahkamah Perusahaan bahawa saksi-saksinya tiada di Mahkamah walaupun mereka

telah dimaklumkan oleh beliau akan tarikh perbicaraan tersebut. Beliau memohon supaya ia direkodkan bahawa beliau telah memohon satu penangguhan atas alasan bahawa saksi-saksinya tiada di Mahkamah. Mahkamah Perusahaan tidak membenarkan penangguhan kedua dan memerintahkan perbicaraan dimulakan. Mahkamah Perusahaan seterusnya mendengar keterangan daripada responden kedua. Mahkamah Perusahaan mendapati bahawa pemecatan responden kedua adalah tanpa sebab atau alasan yang adil. Ini adalah permohonan oleh pemohon untuk satu perintah certiorari bagi membatalkan keputusan Mahkamah Perusahaan. Pemohon juga telah memohon satu perintah mandamus mengarahkan supaya Mahkamah Perusahaan mendengar sekali lagi tuntutan responden kedua terhadap pemohon dan memberikan award yang bersesuaian. Pemohon berhujah bahawa Pengerusi yang arif telah melakukan satu kesilapan dalam keengganannya memberi satu penangguhan apabila dipohon oleh pemohon dan dengan itu melanggar prinsip keadilan asasi.

Diputuskan, menolak permohonan tersebut dengan kos:

(1) Keputusan Pengerusi yang arif dalam tidak membenarkan penangguhan kedua adalah satu pelaksanaan budi bicaranya. Pemohon, setelah gagal menyediakan saksi-saksinya dan setelah diberi peluang kedua untuk berbuat demikian, hanya dapat mempersalahkan dirinya sendiri apabila Mahkamah Persekutuan enggan memberikan penangguhan selanjutnya. Adalah jelas, pemohon tidak mengambil tarikh perbicaraan dengan serius. Sebenarnya peguamcara bijaksana pemohon memberitahu Mahkamah Perusahaan bahawa pengarah urusan pemohon tidak dapat hadir pada hari tersebut disebabkan jadualnya yang sibuk. Walaupun jadualnya sibuk, tetapi mahkamah tidak seharusnya menunggu sehingga dia tidak sibuk. Seperti yang dinyatakan oleh Pengerusi yang arif, kes ini telah berlanjutan lebih daripada dua setengah tahun (lihat perenggan 14–15).

(2) Pemecatan responden kedua tidak boleh disifatkan sebagai penamatan kerja simpliciter. Persoalan sama ada terdapat perbezaan di antara penamatan dan pemecatan telah diputuskan di dalam kes *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304 di mana Mahkamah Persekutuan memutuskan bahawa tidak terdapat perbezaan yang material di antara kedua-duanya. Walaupun tiada sebab diberikan untuk pemecatan seseorang pekerja, pemecatan sebegini yang hanya berdasarkan pada notis kontraktual mesti juga berasaskan atas sebab atau alasan yang adil untuk dijustifikasikan. Ini adalah lebih ketara dalam kes ini di mana surat pemecatan hanya menyatakan bahawa responden kedua didapati 'found unfit to the company'. Oleh kerana pemohon telah memilih memberikan alasan pemecatan tersebut, maka adalah wajib pemohon mengemukakan keterangan untuk menyokong alasannya (lihat perenggan 18, 20–21).

(3) Pemohon gagal mengemukakan keterangan untuk menyokong alasannya. Malah daripada keterangan responden kedua, telah didedahkan bahawa pemohon tidak pernah menjalankan sebarang penilaian prestasi terhadap responden kedua. Pemohon juga tidak menunjukkan kepada responden kedua bahawa kerjanya adalah tidak memuaskan. Tiada amaran lisan ataupun tulisan

diberikan kepada responden kedua akan prestasi kerjanya yang tidak memuaskan. Sebenarnya tiada surat tunjuk sebab pernah dikeluarkan dan tiada siasatan domestik diadakan sebelum pemecatan responden kedua. Mahkamah Perusahaan adalah betul dalam menyatakan bahawa pemecatan responden kedua adalah tanpa sebab atau alasan yang adil (lihat perenggan 22–23).

(4) Adalah satu prinsip yang ketara bahawa seseorang dalam tempoh percubaan mempunyai hak-hak yang sama seperti pekerja tetap atau pekerja yang telah disahkan dan perkhidmatannya tidak boleh ditamatkan tanpa sebab atau alasan yang adil. Seperti seseorang pegawai yang telah disahkan, seseorang dalam tempoh percubaan juga berhak kepada pampasan sekiranya perkhidmatannya ditamatkan tanpa sebab atau alasan yang adil. Menurut s 30 Akta Perhubungan Perusahaan 1967, jumlah pampasan yang patut diawardkan adalah dalam budi bicara Mahkamah Perusahaan (lihat perenggan 25).]

Notes

For cases on probationer, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1056–1064.

Cases referred to

Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304 (folld)
Goon Kwee Phong v J & P Coats (M) Bhd [1981] 2 MLJ 129 (folld)
Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd [1997] 2 MLJ 685 (refd)
Lee Ah Tee v Ong Tiow Pheng & Ors [1984] 1 MLJ 107 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 20(1), 30

Raus Sharif J:

[1] This is an application by the applicant for an order of certiorari to quash the decision of the Industrial Court, in Award No 630 of 2003 made on 18 August 2003. The applicant had also applied for an order of mandamus to direct the Industrial Court to re-hear the second respondent's claim against the applicant and to hand down an appropriate award.

[2] The Industrial Court found that the second respondent had been dismissed without just cause or excuse. The facts giving rise to this application are these.

[3] The second respondent commenced employment with the applicant as the General Manager (Manufacturing Division) on 1 November 1998 with a basic salary of RM8,000 per month. Clause 6, 7 and 8 of the second respondent's letter of appointment provide as follows:

6. Probationary Period:

You will serve a probationary period of three (3) months in the first instance and the probationary period may be extended to another three (3) months if required, at the

discretion of the Company. During the probationary period either party may terminate employment by giving two (2) weeks notice in writing or salary in lieu of notice without any reasons whatsoever.

7. Termination Notice:

Upon confirmation in your appointment, after your probationary period, and thereafter, either party may terminate employment at any time by giving to the other party three (3) months notice of termination or salary in lieu of notice.

8. Confirmation of Employment:

Upon the successful completion of your probationary period, your employment will be confirmed in writing.

[4] At the end of the probationary period of three months, there was no letter from the applicant to extend the second respondent probationary period by another three months. There was also no letter of confirmation issued by the applicant. Nevertheless, the second respondent continued working for the applicant, until he was dismissed by the applicant with effect from 18 March 1999.

[5] In the letter of dismissal dated 5 March 1999, the applicant stated, inter alia, as follows:

Pursuant to the letter of appointment dated 20 October 1998 entered between your goodself and the Company by virtue of clause (6) of the aforesaid contract we would like to give two (2) weeks notice of termination of contract with effect from today as you are found unfit to the Company.

Therefore your last day of service should be on 18th March 1999.

[6] The second respondent, unhappy with his dismissal made a representation to the Industrial Relation Department under s 20(1) of the Industrial Relations Act 1967 ('the Act'). As the parties were unable to settle the dispute, the Honourable Minister of Human Resources referred the dispute to the Industrial Court as required by the Act.

[7] The Industrial Court fixed the case for hearing on 12 and 13 May 2003. On the first day of hearing, the Industrial Court stood down the case from 9am to 9.30am and then again from 9.30am because learned counsel for the applicant had been asked by his office to go to High Court at Wisma Denmark for some matter. When the proceedings resumed at 11am, learned counsel for the applicant, suggested to the Industrial Court that the case be proceeded with only on points of law. He contended that the termination of the second respondent was a termination simpliciter, based on clause 6 of the second respondent's letter of appointment, where either party may terminate the employment by giving two weeks notice.

[8] The Industrial Court did not entertain the preliminary issue as raised by the learned counsel for the applicant based on the principles enunciated in the Supreme Court case of *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685. The Industrial Court then ordered learned counsel for the applicant to proceed with

A the applicant's case. He however informed the Industrial Court that all the applicant's witnesses were not in court and asked for an adjournment of the case to the next day, ie 13 May 2003. The Industrial Court allowed his application and the hearing was adjourned to 9am on 13 May 2003.

B **[9]** On 13 May 2003, learned counsel for the applicant again informed the Industrial Court that his witnesses were not in court even though they had been informed by him of the hearing date. He requested that it be placed on record that he applied for an adjournment on the ground that his witnesses were not in court.

C **[10]** The Industrial Court did not allow the second application for adjournment and ordered the hearing to begin. The Industrial Court then proceeded with the hearing and heard the evidence of the second respondent.

[11] On 18 August 2003, the Industrial Court in delivering her award made the following findings:

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(i) that there was no averment in the applicant's statement in reply that the second respondent was a poor performer and had been found to be unfit for the applicant;

(ii) that there was no averment at all by the applicant to the effect that the dismissal of the second respondent was with just cause or excuse;

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(iii) that the second respondent's dismissal cannot be treated as one of termination simpliciter;

(iv) tThat at the time the second respondent was dismissed, he was still a probationer; and

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(v) tThat the second respondent was dismissed without just cause or excuse.

[12] Hence, this application by the applicant. In challenging the award, learned counsel for the applicant advanced the following grounds:

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(i) the learned Chairman erred in law and fact in exercising her discretion when she refused the applicant's application for adjournment on 13 May 2003;

(ii) the learned Chairman erred in law and facts when she directed the case to be proceeded with by just hearing the second respondent;

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(iii) the learned Chairman erred in law in deciding that the second respondent's dismissal was without just cause or excuse; and

(iv) the learned Chairman erred in law in awarding compensation to the second respondent who was at the material time on probation.

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FINDINGS

(i) First and Second Grounds — Refusal to allow postponement

[13] The first and second grounds raised by the applicant are inter-related. Basically the applicant is contending that the learned Chairman had made a mistake

in refusing the adjournment requested by the applicant and thereby breaching the principle of natural justice. With respects, on the facts of this case, the learned Chairman decision in not allowing the second adjournment was a proper exercise of her discretion.

[14] She gave her reasons as follows:

> … the Company is fully aware of the hearing dates and yet chose not to produce its witnesses in court. Any further adjournment would cause more delay to the disposal of this case which was referred to the Court by the Honourable Minister on 20 November 2000, more than 2 ½ years ago.

[15] I am in total agreement with the learned Chairman. The applicant, after failing to produce its witnesses and after being given the second chance to do so, has itself to be blamed when the Industrial Court refused to grant further adjournment. Clearly, the applicant did not take hearing dates seriously. Infact learned counsel for the applicant informed the Industrial Court that managing director of the applicant could not come on that day because of his busy schedule. He may have a busy schedule, but the court must not be made to wait for him until the day he is free. As pointed by the learned Chairman, the case has been pending for more than two and a half years.

[16] In *Lee Ah Tee v Ong Tiow Pheng & Ors* [1984] 1 MLJ 107, Hashim Yeop A Sani FJ (as he then was) speaking for the Federal Court had this to say regarding the discretion of a judge to allow or refuse an application for adjournment:

> The discretion of the Judge to allow or refuse an application for adjournment was a subject dealt with in depth by the Court of Appeal in *Dick v Piller*. We agree to and adopt the following principles as regards the discretion in allowing or refusing an adjournment:
>
> (1) Whether or not a party should be granted and adjournment is wholly at the discretion of the Judge. He would exercise the discretion solely upon his view of the facts.
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> (2) Prima facie this discretion is unfettered.
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> (3) The question to ask in any particular case is whether on the facts there are adequate or sufficient reasons to refuse the adjournment.
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> (4) Although an appellate court has power to interfere with the Judge's decision in regard to the granting of an adjournment, it would refrain from doing so unless it appears that such discretion has been exercised in a way which tended to show that all necessary matters were not taken into consideration or the decision was otherwise arbitrarily made.
>
> (5) An appellate court ought to be very slow to interfere with the exercise of the discretion. But if it appears that the result of the order made below would be to defeat the rights of the parties although or that more would be an injustice to one or the other of the parties then the appellate court has power and indeed a duty to review the exercise of the discretion.

[17] I am adopting the same principle. On the facts of this case, I have no reason to interfere with the exercise of discretion of the Industrial Court in refusing the applicant's application for the second adjournment.

(ii) Third Ground — Dismissal without just cause or excuse

[18] The applicant's case is that the termination of the second respondent was a termination simpliciter and not a dismissal. This is because, according to the applicant, the second respondent was a probationer, and clause 6 of the letter of appointment provided that either party need only to give two weeks notice in writing in lieu thereof which the applicant had complied with. Further, according to the applicant, as provided in clause 6, the notice of termination can be given without any reasons whatsoever. Thus, it is the contention of the applicant that the termination of the second respondent was proper and in accordance with the contract of employment between the parties.

[19] However, the Industrial Court found that the second respondent's dismissal cannot be treated as a termination simpliciter. According to the Industrial Court, it may be lawful for the applicant to terminate the employment of the second respondent in accordance with the provisions of clause 6 of the letter of appointment but what is considered to be lawful according by the law of contract and the principle of freedom to contract can never be deemed as a dismissal with just cause or excuse according to industrial jurisprudence.

[20] I am in agreement with the Industrial Court. The question whether there is any difference between a termination and dismissal has been dealt with in *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304 ('*Dr A Dutt*') where the Federal Court held that there was no material distinction between the two. The decision in *Dr A Dutt* was reiterated by the Federal Court in *Goon Kwee Phong v J & P Coats (M) Bhd* [1981] 2 MLJ 129 where Raja Azlan Shah CJ (as he then was) stated:

> In *Dr A Dutt v Assunta Hospital*, this court held that the so called 'termination simpliciter', ie a termination by contractual notice and for no reason, if ungrounded or any just cause or excuse would still be dismissed without just cause or excuse and the workman's compensation, the Industrial Court may award reinstatement or compensation in lieu of reinstatement.

[21] From the above two Federal Court cases, it appear that even if no reason was given on the termination of a workman, such termination based on mere contractual notice must still be grounded on just cause or excuse for it to be justified. This must be more true when as in the present case the letter of termination stated that the second respondent had been 'found unfit to the company'. Since the applicant had chosen to give the reason for the termination, it is incumbent for the applicant to adduce evidence to support its claim.

[22] The applicant failed to adduce evidence to support its claim. Instead from the evidence of the second respondent it is revealed that the applicant did not carry out any performance appraisal on the second respondent. The applicant did not indicate to the second respondent that his work was unsatisfactory. There was no verbal or written warning being given to the second respondent about the unsatisfactory work performance. In fact no show cause letter was ever issued and there was no domestic inquiry held before the dismissal of the second respondent.

[23] Hence, the applicant third ground is without merit. To me, the Industrial Court was right in holding that the applicant was dismissed without just cause or excuse.

(iii) Fourth Ground — Compensations

[24] The applicant is contenting that since the second respondent was on probation he was not entitled to the compensations as awarded by the Industrial Court. The Industrial Court awarded the second respondent as follows:

(i) The applicant to pay the second respondent backwages based on his monthly basis salary but limited to 6 months as follows:-

RM8,000 x 6 months

= RM48,000

(x) Compensation in lieu of reinstatement to be paid by the applicant to the second respondent as follows:-

4 ½/12 x RM8,000

= RM3,000

[25] It is a well established principle that a probationer enjoys the same rights as a permanent or confirmed employee and his service cannot be terminated without just cause or excuse. Like a confirmed officer, a probationer is also entitled to compensation when he is found that his service is terminated without just cause or excuse. By s 30 of the Act, the amount of compensation to be awarded is within the discretion of the Industrial Court.

[26] In this present case, I find that the learned Chairman, had correctly made the order of payment of compensation to the second respondent and having regard to the reasons and circumstances leading to the dismissal of the second respondent the total amount of compensations of RM51,000 was fair and reasonable.

[27] In conclusion, I am of the view that the decision of the Industrial Court does not suffer any of the affirmation of 'illegality', 'irrationality' or 'procedural impropriety' and there was also no breach of natural justice. The award was neither perverse nor unreasonable as the findings of facts by the Industrial Court were support by evidence. Accordingly, the applicant's application is dismissed with costs.

Application dismissed with costs.

Reported by Sally Kee